Supreme Court, U.S.
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No. 97-___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ADAMS FORD BELTON, INC.,

Petitioner,

v.

MISSOURI MOTOR VEHICLE COMMISSION, BILL BEST, TOM CALDER, JACK CHANCE, SANDRA FOCHT, BILL McMURRAY, CARL RICHARDSON, AND DON WHITE,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a State licensing agency violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by regulating advertising published by resident motor vehicle dealers but not regulating identical advertising published within that State by non-resident motor vehicle dealers solely because of the residence of the dealers.

2. Whether a State licensing agency's regulation prohibiting the truthful advertisement of the sale price of a motor vehicle in relation to the manufacturer's invoice violates the free speech clause of the First Amendment to the United States Constitution.

PARTIES

The Petitioner in this case is Adams Ford Belton, Inc.

The Respondents are the Missouri Motor Vehicle Commission; and Bill Best, Tom Calder, Jack Chance, Sandra Focht, Bill McMurray, Carl Richardson, and Don White, in their official capacities as members of the Missouri Motor Vehicle Commission.

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OPINIONS BELOW

The June 17, 1997, decision of the Missouri Supreme Court denying rehearing is unreported, and is reprinted in Appendix B to this Petition at pp. A16-A18. The May 27, 1997, opinion of the Missouri Supreme Court on the merits, whose judgment is herein being sought to be reviewed, is reported at 946 S.W.2d 199, and reprinted in Appendix A, at pp. A1-A15. The December 24, 1996, Opinion of the Missouri Court of Appeals transferring this cause to the Missouri Supreme Court is reported at 1996 WL 733279 and is reprinted in Appendix C to the Petition at pp. A19-A24. The Order and Findings of Fact and Conclusions of Law of the Circuit Court of Cole County, Missouri, 19th Judicial Circuit, Nos. CV194-1312CC and CV195-665CC, Consolidated (May 17, 1996), are unreported and are reprinted in Appendix D, at pp. A25-A27, and Appendix E, at pp. A28-A44, respectively. The May 23, 1995, Opinion of the Missouri Motor Vehicle Commission on review of the Hearing Officer's Decision, is unreported and is reprinted in Appendix F, at p. A45-A46. The February 23, 1995, Amended Order of the Missouri Motor Vehicle Commission Hearing Officer is unreported and is reprinted in Appendix G, at p. A47. The February 9, 1995, Findings of Fact, Conclusions of Law and Order of the Missouri Motor Vehicle Commission Hearing Officer is unreported and is reprinted at Appendix H, at pp. A48-A53.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on May 27, 1997. Petitioner timely filed a Motion for Rehearing which was denied by the Missouri Supreme Court on June 17, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the Free Speech Clause of the First Amendment to the Constitution of the United States, made applicable to the States via the Fourteenth Amendment, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The two regulations of the Missouri Motor Vehicle Commission challenged here are 12 C.S.R. 60-5.010(2)(M), which provides:

> Licensee shall not advertise a motor vehicle with regards to the invoice price, dealer cost, or any similar term or phrase as consumers equate invoice with cost which is misleading and prohibited.

and 12 C.S.R. 60-5.010(2)(AA), which provides:

> Licensees shall not make any reference to matching or bettering competitors' prices in any advertisement unless all limitations are clearly and conspicuously disclosed. Any policy shall not place an unreasonable burden on the consumer.

(hereinafter "price bettering" advertising).

STATEMENT OF THE CASE

This cause of action arose as a result of sanctions imposed by the Missouri Motor Vehicle Commission against Adams Ford Belton, Inc., a Missouri motor vehicle dealer, for violation of certain of the Commission's advertising regulations. Adams Ford challenges the constitutionality of the regulations on the basis of the Equal Protection Clause, and the First Amendment to the United States Constitution.

Adams Ford Belton, Inc. ("Adams Ford") is a Missouri corporation engaged in the business of new and used automobile sales in Belton, Missouri. On Saturday, April 2, 1994, Adams Ford placed an advertisement in the *Kansas City Star* which read, in part: "$5,000* GUARANTEES THAT WE WILL BEAT ANY DEAL, ANY WHERE, ANY TIME." App. A at A4. The asterisk referred to smaller print at the bottom of the advertisement, which stated, "*ALL APPLICABLE REBATES TO DEALER."

On May 28, 1994, Adams Ford placed a second advertisement in the *Kansas City Star*, offering to sell new Ford motor vehicles for: "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK." App. A at A4.

In or about August, 1994, the Missouri Attorney General, on behalf of the Missouri Motor Vehicle Commission, filed a Complaint before the Missouri Motor Vehicle Commission (the "Commission") against Adams Ford alleging that these advertisements violated the Commission's advertising rules and regulations. The Commission is an agency of the State of Missouri that regulates and licenses motor vehicle dealers doing business in the state. Adams Ford is licensed by the Commission. Count I of the Complaint alleged that Adams Ford's April 2, 1994, advertisement which stated: $5,000* GUARANTEES WE WILL BEAT ANY DEAL, ANY WHERE, ANY TIME," violated the Commission's regulation, 12 C.S.R. 60-5.010(2)(AA). That regulation provides:

> Licensees shall not make any reference to matching or bettering competitors' prices in any advertisement unless all limitations are clearly and conspicuously disclosed. Any policy shall not place an unreasonable burden on the consumer.

(hereinafter "price bettering" advertising).

Count II of the Complaint alleged that Adams Ford's May 28, 1994, which read: "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK," violated 12 C.S.R. 60-5.010(2)(M), which provides:

> Licensee shall not advertise a motor vehicle with regards to the invoice price, dealer cost, or any similar term or phrase as consumers equate invoice with cost which is misleading and prohibited.

(hereinafter "invoice advertising").

In response to the Commission's administrative action, Adams Ford filed its Petition for Declaratory Judgment and Request for Stay of Agency Proceeding, with the Circuit Court of Cole County, Missouri, on October 21, 1994. Appendix K, pp. A69-A75. Adams Ford first asserted its constitutional challenges in the declaratory judgment action by alleging that the Commission's regulations violated various constitutional rights, including the First and Fourteenth Amendments to the United States Constitution (App. K, pp. A72-A73), and sought a stay of the administrative proceedings until the circuit court ruled on the constitutionality of the regulations at issue. The circuit court denied the request for stay on October 26, 1994. Adams Ford first asserted its First Amendment and Equal Protection constitutional challenges in the administrative proceedings as affirmative defenses in its Response to the Commission's Complaint, filed with the Commision on or about October 27, 1994. (Appendix J, at pp. A63-A68). The administrative hearing on the Commission's Complaint was held on October 28, 1994, at which time the following pertinent facts were presented.

A. FACTS RELATING TO EQUAL PROTECTION CHALLENGE

Adams Ford's equal protection argument centers on the fact that the Commission enforces its regulations against Missouri-resident motor vehicle dealers, but not against Kansas-resident motor vehicle dealers who publish advertisements in the State of Missouri that clearly violate the regulations. The advertisements for which Adams Ford was sanctioned were published in the *Kansas City Star*, a daily newspaper that primarily serves the Kansas City metropolitan area. The Kansas City metropolitan area includes the cities of Kansas City, Missouri, and Kansas City, Kansas, as well as several surrounding cities on both sides of the Missouri/Kansas state line. The newspaper is published in Kansas City, Missouri and distributed to residents on both sides of the Missouri/Kansas state line. Adams Ford presented evidence at the hearing, which was uncontroverted, which established that Kansas car dealers routinely place advertisements in the *Kansas City Star*, which are then distributed to residents of the State of Missouri. Adams Ford introduced into evidence copies of some of those advertisements establishing that Kansas car dealers engage in the same invoice advertising in Missouri that is prohibited by the Commission's regulations, and for which Adams Ford was sanctioned. Appendix L, pp. A76-A77. Greg Mitchell, Executive Director of the Commission, admitted during the administrative hearing that the Commission enforces its advertising regulations only against Missouri-resident motor vehicle dealers (*i.e.*, dealers licensed by the Commission).

B. FACTS RELATING TO FIRST AMENDMENT CHALLENGE

Adams Ford also challenges the Commission's regulation which prohibits invoice advertising on the grounds that such prohibition violates its constitutional rights to freedom of speech. Adams Ford advertised that it would sell all Ford motor vehicles in stock for "$100 over Ford factory invoice." Scott Adams, President of Adams Ford, testified that the Ford factory invoice is the invoice that his dealership receives from the manufacturer, Ford Motor Company. It contains a black box in which the "invoice total" price is printed. The invoice also clearly shows any holdback or financing costs. It further states on the invoice that "THIS INVOICE MAY NOT REFLECT THE FINAL COST OF THE VEHICLE IN VIEW OF THE POSSIBILITY OF FUTURE REBATES, ALLOWANCES, DISCOUNTS AND INCENTIVE AWARDS FROM FORD MOTOR COMPANY TO THE DEALER." The invoice total price is the amount that Adams Ford actually pays Ford Motor Company for that vehicle, and which is placed in Adams Ford's books of account. It is also the price upon which Adams Ford pays taxes, and bases its decision as to the sale price of the vehicle.

Adams Ford placed the Ford factory invoice on the dash of each car to be sold during its promotion. Customers who purchased vehicles from Adams Ford pursuant to its promotion actually paid $100 over the "invoice total" reflected on the Ford factory invoice as advertised.

Greg Mitchell testified at the hearing that the "primary goal of the advertising regulations was to prevent

consumers from being mislead or deceived by language that might appear in an advertisement by a dealer." As George Gurnett, a Field Agent and Program Administrator for the Commission, testified at the hearing, the Commission believes that the term "invoice" is misleading because it does not reflect the dealer's "actual" cost since the dealer may receive end-of-the-year rebates, holdbacks or other financial incentives from the manufacturer, which would reduce the dealer's final cost. As a result, the Commission has ruled that the word "invoice" may not be used in any advertisement, regardless of whether or not it is truthful. In fact, in the Commission's publication, *A Guide to Complying with the Advertising Rules*, 2d Ed., Feb. 1994, the Commission stated that the word "invoice" "cannot be used in advertising regardless of whether it represents the true price a dealer pays the manufacturer for a given vehicle or not."

However, Scott Adams' uncontroverted testimony was that the dealer's receipt of a holdback is not an event that is definite and certain to occur, but rather is contingent upon certain conditions. George Gurnett recognized the contingent nature of these incentives when he testified that the dealer has the "opportunity" for rebates, holdbacks, and other incentives. Further, there was no evidence offered at the administrative hearing that any customer was mislead or deceived by Adams Ford's advertisement. Rather, the Commission's complaint was brought against Adams Ford when another motor vehicle dealer brought the advertisements to the Commission's attention. In addition, the Commission presented no statistics or other evidence that any persons have actually been mislead or deceived by invoice advertising.

On or about February 9, 1995, the Hearing Officer issued his Findings of Fact, Conclusions of Law and Order (hereinafter the "Hearing Officer's Decision"), finding that Adams Ford violated the advertising regulations, 12 C.S.R. 60-5.010(2)(AA) (price bettering regulation) and 12 C.S.R. 60-5.010(2)(M) (invoice advertising regulation). App. H, at A52-A53. The Hearing Officer ordered that a private letter of admonition be issued to Adams Ford for violation of 12 C.S.R. 60-5.010(2)(AA), and that Adams Ford's license to operate as a Motor Vehicle Dealer within the State of Missouri be suspended for two days as a result of the violation of 12 C.S.R. 60-5.010(2)(M). *Id;* App. G, at A47.

On February 23, 1995, Plaintiff filed with the Commission an Application for Review of the Hearing Officer's Decision, asserting, among other things, that the regulations were unconstitutional. Plaintiff's Application for Review was considered by the Commission and, on May 23, 1995, the Commission entered its Opinion that the facts did not support the Hearing Officer's decision to impose a two-day suspension. App. F, at A45. The Commission set aside the Hearing Officer's decision of February 9, 1995, and instead ordered that Plaintiff be issued a private reprimand for its violations of both 12 C.S.R. 60-5.010(2)(AA) and 12 C.S.R. 60-5.010(2)(M). *Id.* The Commission did not consider the constitutional arguments.

On June 19, 1995, Adams Ford filed its Petition for Review of the Hearing Officer's Decision with the Circuit Court of Cole County, Missouri, seeking review of the Hearing Officer's Decision, as affirmed by the Commission. Appendix I, pp. A54-A62. This Petition reasserted Adams Ford's constitutional challenges to the regulations

on the basis of the Equal Protection Clause and First Amendment. App. I, at A60.

Because the issues in the administrative review case and the previously filed declaratory judgment action were identical, the circuit court consolidated these two actions on January 12, 1996. The parties stipulated that the record of the administrative proceeding would serve as the record for the disposition of both cases.

The parties filed cross-motions for summary judgment, and, on May 17, 1996, the circuit court entered summary judgment in favor of the Commission affirming the Commission's decision and upholding the constitutionality of the Commission's regulations. App. E, at A28-A44; App. D, at A25-A27.

With regard to Adams Ford's equal protection argument, the circuit court held that the Commission's regulations did not create classifications among resident and non-resident motor vehicle dealers. App. E, at A33. The court further held that even if the challenged regulations did create classifications, they survived rational basis review in that the State has a compelling interest in "ensuring that citizens receive truthful, non-deceptive information concerning lawful commercial transactions involving motor vehicle dealers." App. E, at A33-A34.

The circuit court rejected Adams Ford's argument that all motor vehicle dealers who advertise within the State of Missouri must be treated equally regardless of their residence, holding that: "If we were to follow the Plaintiff [sic] view, all states would have to have exactly the same regulations because each state would be required to treat all bordering state's citizens identically,

regardless of whether there is statutory authority to regulate a non-resident." App. E, at A35.

With regard to Adams Ford's First Amendment claims, the Court held that invoice advertising is *inherently* misleading and therefore receives no First Amendment protection. App. E, at A41.

Adams Ford appealed the circuit court's decision to the Missouri Court of Appeals on various grounds, including the Equal Protection Clause and the First Amendment. The appellate court did not reach the merits of the appeal. Rather, it transferred the case to the Missouri Supreme Court for the reason that the Missouri Supreme Court has exclusive appellate jurisdiction with regard to the constitutionality of statutes and hence state regulations. App. C, at A19-A24. The Missouri Supreme Court held that its exclusive appellate jurisdiction extends only to the constitutional validity of a statute, not a regulation, and therefore appellate jurisdiction, in fact, lies with the Court of Appeals. App. A, at A2-A3. The Court nevertheless accepted transfer because the case involved important issues of general interest regarding commercial free speech rights in advertising. App. A, at A3.

In its opinion, the Missouri Supreme Court affirmed the circuit court's judgment. With regard to the equal protection claims, the Court suggested two possible rational bases for treating advertisements by in-state dealers differently than those of out-of-state dealers: (1) "the legislature may have determined that it was difficult, if not impossible, for the Commission to enforce its regulations against out-of-state dealers;" and (2) "the legislature may have intended to protect only consumers who

purchase vehicles in this state, leaving consumers who choose to purchase vehicles in other states to such remedies or protection as those states may choose to provide." App. A, at A7. Accordingly, the Court held that because the regulations were supported by these rational bases, they did not violate equal protection. *Id.*

With regard to the First Amendment claims, the Court held the term "invoice price" is inherently misleading because that price is "subject to manipulation by undisclosed dealer rebates, allowances or incentives" and therefore "does not reflect the dealer's price." App. A, at A11. Apparently because it held that invoice advertising is *inherently* misleading, the Court did not consider Adams Ford's arguments that such advertising is only *potentially* misleading and can be cured by disclaimer.

REASONS FOR GRANTING CERTIORARI

A. This Case Presents Questions of General Importance Regarding Commercial Free Speech

This case presents important questions regarding commercial free speech. Not only does the Commission's regulation prohibiting truthful advertisement of the sale price of a vehicle in relation to the manufacturer's invoice directly infringe on First Amendment freedoms, the unequal enforcement of the Commission's regulations indirectly implicates commercial free speech in that non-resident motor vehicle dealers are permitted to engage in advertising practices in this State which are unlawful for resident motor vehicle dealers. By regulating only advertisements published by resident motor vehicle dealers but

not those published in this State by non-resident dealers, the State of Missouri has created an unequal playing field, leaving resident motor vehicle dealers at a significant competitive disadvantage.

This unequal enforcement of regulations against residents and non-residents has wide implications beyond just motor vehicle dealers. Were the Missouri Supreme Court's decision upheld, it would permit any State agency to selectively enforce its regulations only against residents, giving non-residents an unfair competitive advantage.

B. The Missouri Supreme Court's Decision Conflicts With This Court's Decision in *Williams v. Vermont* that States May Not Treat Those Within Its Borders Unequally Solely on the Basis of Residence

In *Williams v. Vermont*, 472 U.S. 14, 23-24, 105 S. Ct. 2465, 2472 (1985), this Court held that under the Equal Protection Clause a "State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation." The State of Missouri is doing precisely that; Missouri-resident motor vehicle dealers are treated differently than non-resident motor vehicle dealers solely because of their residence.

It is undisputed that the Commission's regulations prohibit only Missouri-resident motor vehicle dealers from advertising the sale price of a vehicle with reference to the invoice price, yet non-resident motor vehicle

dealers can and do publish identical "invoice" advertisements in the State of Missouri with impunity. The Missouri Supreme Court erroneously held that this difference in treatment did not violate the Equal Protection Clause.

The Missouri Supreme Court assumed, without deciding, that "the legislature could have empowered the Commission to regulate in-state advertisement by all dealers, licensed or unlicensed," but held that this fact was not dispositive. App. A, at A7. It held that a state "may proceed step-by-step to ameliorate a perceived evil or it may perceive evils in the same field to be of different dimension and proportions, requiring different remedies," citing *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). *Id.* The problem with this holding is that, here, the perceived evil is not different in dimension or proportion, but is precisely the same "evil." If an advertisement is misleading, it is equally misleading whether published by a Missouri resident or by a non-resident. More importantly, this reasoning conflicts with this Court's holding in *Williams v. Vermont*, 472 U.S. 14 (1985), that a state may not differentiate between persons solely on the basis of their residence. There is no rational basis for treating an advertisement published in this State by a Missouri resident differently than an advertisement published in this State by a non-resident.

The Missouri Supreme Court suggested two possible rational bases for the difference in treatment. The first "rational basis" is that "the legislature may have determined that it was difficult, if not impossible, for the Commission to enforce its regulations against out-of-state dealers." App. A, at A7. However, it is not difficult or impossible for the State to enforce its regulations against

out-of-state dealers. In fact, at the time the Missouri Motor Vehicle Commission was created, the State of Missouri already had in place a system designed to protect consumers from any and all deceptive advertising within this State, the Unlawful Merchandising Practices Act ("UMPA"), RSMo § 407.020, *et seq.* (1976). The UMPA provides, in pertinent part:

> 1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or *advertisement of any merchandise in trade or commerce . . . in* or from *the state of Missouri,* is declared to be an unlawful practice.

RSMo § 407.020.1 (emphasis added). The provisions of this act are enforced by the Missouri Attorney General. RSMo § 407.040. Thus, misleading advertisements by motor vehicle dealers – which the Commission seeks to prohibit in its regulations – are also proscribed under the UMPA. However, under the UMPA, the Attorney General has the power to enforce the provisions of the Act against *any* car dealer who publishes a misleading advertisement within the State of Missouri, without regard to its state of residence. Clearly, the legislature can and does regulate advertisements of out-of-state dealers and therefore there is no rational basis for distinguishing between resident and non-resident motor vehicle dealers.

The second basis offered by the Missouri Supreme Court is that "the legislature may have intended to protect only consumers who purchase vehicles in this state, leaving consumers who choose to purchase vehicles in

other states to such remedies or protection as those states may choose to provide." App. A, at A7. However, the purported harm that the Commission seeks to remedy with the regulations at issue here lies not with the sale, but with the advertisement itself. Indeed, the Commission, which enacted the regulations at issue, argued in its briefs before the Court of Appeals and Missouri Supreme Court that "[t]he principal purpose of these regulations is to protect the public from improper advertising in the original advertisement, not just once they are in the dealership and subject to sales techniques." If, as the Commission admits, the purpose of the regulations is to prevent consumers from being enticed to go to a dealership based on a misleading advertisement, it matters not whether that advertisement is published by a Missouri resident or non-resident. There is no rational basis for distinguishing between the two.

C. The Missouri Supreme Court's Decision Conflicts with this Court's Decision In *In Re R.M.J.* That Potentially Misleading Advertising That Can Be Cured With A Disclaimer May Not Be Absolutely Prohibited

The Missouri Supreme Court held that invoice advertising is likely to deceive and therefore is *inherently* misleading. App. A, at A11. The Court reasoned that consumers equate the word "invoice" with the price a dealer paid the manufacturer for the vehicle or "dealer's cost." *Id.* at A10-A11. Since a dealer may potentially receive holdbacks, incentives or rebates from the manufacturer which would change the ultimate, "bottom line"

dealer's cost, use of the word "invoice" is inherently misleading. *Id.* at A9-A11.

The Missouri Supreme Court ignored Adams Ford's arguments that *truthful* invoice advertising is not misleading, and, even if it were, it is only *potentially* misleading and can be cured by a disclaimer. This case squarely presents this Court with an opportunity to provide guidance as to what constitutes inherently misleading advertising as opposed to potentially misleading advertising.

This Court in *In Re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 937 (1982) held that where potentially misleading advertising can be presented in a way that is not deceptive, states may not place an absolute prohibition on such advertising. This Court expressed a preference for the use of disclaimers or explanation.

Adams Ford suggests that even if the word "invoice" is misleading, that fact does not, *ipso facto*, make it *inherently* misleading, as the Missouri Supreme Court held, as opposed to merely *potentially* misleading. There is nothing in the record which establishes that invoice advertising has in fact been deceptive. *See In Re R.M.J.*, 455 U.S. 191, 202, 102 S. Ct. 929, 937 (1982) (regulation is "permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive."). Rather, the assertion that it is misleading is based solely upon the wholly unsupported conclusions of the Commission that consumers may be confused about the meaning of the word "invoice."

The Missouri Supreme Court's holding ignores this Court's admonition that states may not absolutely prohibit potentially misleading information if it can be presented in a way that is not misleading. A simple disclaimer or explanation, such as "the dealer may receive holdbacks, incentives and rebates, and therefore the invoice price may not reflect the dealer's final cost," would cure any confusion as to whether the advertised invoice price reflects the ultimate, final cost to the dealer.

The Missouri Supreme Court suggested that invoice advertising is "meaningless" and consumers are better served by advertisement in relation to the manufacturer's suggested retail "sticker" price. App. A, at A11. However, the manufacturer's suggested retail "sticker" price is an even more amorphous, ethereal and absolutely meaningless figure. Whereas an invoice lets the consumer know the exact price that a dealer paid the manufacturer for the vehicle (at least as of the date of the sale), the sticker price imparts absolutely no useful information to the consumer. The aim of the First Amendment is to provide for the free flow and exchange of information. *See Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349 (1980). This Court has

> rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . . "

Id. (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770, 96 S. Ct. 1817, 1829 (1977)). The Commission's regulation, which places a total ban on invoice advertising, is highly paternalistic and substantially curtails consumers' access to valuable information.

The absolute prohibition of invoice advertising is not narrowly drawn in that any confusion can be cured with a simple disclaimer, and therefore the Commission's regulation impermissibly infringes on Adams Ford's freedom of speech.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Missouri Supreme Court.

Respectfully submitted,

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APPENDIX A

(Logo)

Supreme Court of Missouri

en banc

ADAMS FORD BELTON, INC., Appellant, vs. MISSOURI MOTOR VEHICLE COMMISSION, Respondent.	)	No. 79563 (Filed May 27, 1997)

Appeal from the Circuit Court of Cole County
The Honorable Patricia Joyce, Judge

Adams Ford Belton, Inc., brought a declaratory judgment and injunction action seeking to have certain regulations of the Missouri Motor Vehicle Commission (Commission) declared unconstitutional and to terminate a disciplinary proceeding by the Commission against Adams Ford. That action was consolidated with a subsequent petition for review of the administrative disciplinary proceeding filed in the circuit court. The circuit court entered summary judgment in favor of the Commission in both cases. The judgment was appealed to the court of appeals. Because of the general interest or importance of the questions presented, the case is transferred to this Court. *Mo. Const. art. V, sec. 10.*

The issues presented here include whether the circuit court correctly upheld the constitutionality of state regulations prohibiting motor vehicle advertisements that

refer to "invoice price" or that mention price matching without disclosing all limitations imposed by the dealer. Adams Ford challenges the regulations on equal protection, privileges and immunities, and First Amendment grounds. The regulations do not violate those constitutional provisions. The judgment of the circuit court is affirmed.

I.

At the outset, this Court must determine sua sponte whether it has jurisdiction of this appeal. The appeal was initially taken to the Missouri Court of Appeals, Western District. The court of appeals transferred this case because "it presents a real and substantial constitutional issue" involving the validity of certain regulations of the Commission. The court of appeals reasoned that because duly promulgated regulations have the force and effect of statutes and this Court has exclusive appellate jurisdiction over the constitutionality of statutes, this Court had exclusive jurisdiction over an appeal involving the constitutionality of a regulation.

The Supreme Court has exclusive appellate jurisdiction of all cases involving the validity of a statute. *Mo. Const. art. V, sec. 3.* No case cited or found has held that such jurisdiction extends to claims regarding the constitutionality of a regulation issued by an administrative agency. The constitution makes separate reference to administrative regulations and to statutes. For example, article III, sec. 34, provides for the revision, digesting and promulgation of statutes. However, article IV, sec. 16

makes different provision for the adoption of administrative rules and regulations. *See also Mo. Const. art. V, sec. 18* (making special provision for judicial review of certain administrative agency rules).

From the above, it is obvious that the drafters of the constitution drew a clear distinction between statutes and administrative rules. When the word "statute" was used in article V, sec. 3 it plainly was not intended to include agency regulations.

This Court recently held that its appellate jurisdiction did not extend to constitutional questions not directly involving the validity of a statute. *Alumax Foils, Inc. v. City of St. Louis*, 939 s.W.2d 907, 912 (Mo. banc 1997). Here there is no claim that the statutes authorizing the regulations are invalid. Because no claim involving the validity of a statute is involved, initial appellate jurisdiction lies with the court of appeals. Thus, even a colorable claim regarding the constitutionality of a regulation is not within the exclusive jurisdiction of the Missouri Supreme Court.

Nevertheless, the constitution authorizes transfer by order of this Court before or after opinion because of the general interest or importance of the question involved in the case. This case involves important issues of general interest regarding commercial free speech rights in advertising. For that reason, this Court grants transfer. *Mo. Const. art. V, sec. 10.* Because the issues have been fully briefed and argued on the merits, the case is submitted.

II.

On April 2, 1994, Adams Ford, a car dealership in Missouri, placed an advertisement in the *Kansas City Star*, a newspaper distributed in Missouri and Kansas. The advertisement stated, "$5,000* GUARANTEES WE WILL BEAT ANY DEAL, ANYWHERE, ANY TIME." The asterisk referred to smaller print at the bottom of the advertisement, which stated, "*ALL APPLICABLE REBATES TO DEALER[.]" On May 28, 1994, Adams Ford placed another advertisement in the *Kansas City Star*, which read: "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK[.]"

After receiving a complaint from another dealership, the Commission charged Adams Ford with violating its advertising regulations. An administrative disciplinary proceeding was commenced pursuant to sec. 301.562.[1] With respect to the April 2 advertisement, Adams Ford was charged with violating 12 C.S.R. 60-5.010(2)(AA), which provides: "[Licensed motor vehicle dealers] shall not make any reference to matching or bettering competitors' prices in any advertisement unless all limitations are clearly and conspicuously disclosed. Any policy shall not place an unreasonable burden on the consumer[.]" Adams Ford was also charged with violating 12 C.S.R. 60-5.010(2)(M) for its May 28 advertisement. This regulation prohibits licensed dealers from advertising "a motor vehicle with regards [sic] to the invoice price, dealer cost,

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[1] All references to statutes are to RSMo 1994, unless noted otherwise.

or any similar term or phrase as consumers equate invoice with cost which is misleading and prohibited[.]"

Following a disciplinary hearing, the hearing officer concluded that Adams Ford violated both regulations. For violating 12 C.S.R. 60-5.010(2)(AA), a private letter of reprimand was to be issued. For violating 12 C.S.R. 60-5.010(2)(M), the hearing officer ordered the dealership license suspended for two days.

Adams Ford appealed the decision of the hearing officer to the Commission as provided by 12 C.S.R. 60-4.040(9). In an opinion dated May 23, 1995, the Commission concluded that the facts did not support the hearing officer's imposition of a two-day suspension. The Commission ordered a private reprimand for both violations.

On October 21, 1994, prior to the administrative hearing, Adams Ford filed a declaratory judgment action in the circuit court pursuant to sec. 536.050. Adams Ford claimed that the Commission's regulations violate its constitutional rights. On June 19, 1995, after the Commission issued its opinion, Adams Ford filed a petition in the circuit court seeking reviewing [sic] of the agency's decision. The circuit court consolidated both actions. The parties agreed that the record of the administrative proceeding would serve as the record for disposition of the case in the circuit court. The parties filed cross-motions for summary judgment. Summary judgment was entered upholding the constitutionality of the advertising regulations.

III.

In its first point on appeal, Adams Ford argues that the circuit court failed to state all of the relevant and undisputed facts in the court's finding of facts and conclusions of law. However, a circuit court's grant of summary judgment is reviewed de novo. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is proper if the record, viewed in a light most favorable to the nonmoving party, shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Rule 74.04(c)(3)*. This Court is not limited to consideration of the factual findings of the circuit court. In sum, any deficiency in the findings of fact is of no consequence in this appeal.

IV.

Adams Ford asserts that the advertising regulations violate equal protection in that the advertising regulations only apply to "resident" motor vehicle dealers. Minimal scrutiny is required unless it is shown that the regulation applies to a suspect class or the regulation impinges upon a fundamental right. There is nothing suspect about a class that includes only automobile dealerships doing business inside the state. In addition, as is further discussed under Part VI of this opinion, there is no free speech violation and, thus, no impingement on a fundamental right. Only minimal scrutiny is required, that is, an inquiry as to whether the regulations are rationally related to a legitimate governmental interest. *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 752-53

(5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *see also Williams v. Vermont*, 472 U.S. 14, 22-23 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

The Commission's regulations serve a legitimate governmental interest by ensuring that consumers who purchase vehicles from car dealers doing business in this state are not mislead by dealers' advertisements. Assuming, without deciding, that the legislature could have empowered the Commission to regulate in-state advertisement by all dealers, licensed or unlicensed, this conclusion is not dispositive. The state may proceed step-by-step to ameliorate a perceived evil or it may perceive evils in the same field to be of different dimensions and proportions, requiring different remedies. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

In this case, the legislature may have determined that it was difficult, if not impossible, for the Commission to enforce its regulations against out-of-state dealers. In addition, the legislature may have intended to protect only consumers who purchase vehicles in this state, leaving consumers who choose to purchase vehicles in other states to such remedies or protection as those states may choose to provide. Clearly, these considerations provide a rational basis for the treatment of advertising by in-state dealers in a manner different from advertising by dealers who do not sell vehicles in the state of Missouri.

V.

Adams Ford next argues that the advertising regulations violate the Privileges and Immunities Clause of the

Fourteenth Amendment in that the regulations treat resident and non-resident dealers differently. The argument does not merit an extended discussion. The Privileges and Immunities Clause of the Fourteenth Amendment protects only certain rights of national citizenship, none of which are established here. *See Twining v. New Jersey*, 211 U.S. 78, 96-97 (1908). Assuming the argument is directed at the Privileges and Immunities Clause of Article IV, Adams Ford lacks standing to assert such claim because corporations are not citizens of the state within the meaning of that clause. *See Norfolk & W. R.R. v. Pennsylvania*, 136 U.S. 114, 118 (1890).

VI.

The parties agree that the advertisements in question are commercial speech. Because commercial advertising has greater potential for deception and confusion than non-commercial speech, its content may be more readily regulated. The Supreme Court has formulated a four-part test for determining whether certain commercial speech is protected by the First Amendment:

> For commercial speech to come within [the protection of the First Amendment], it at least must concern a lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. New York Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). Under this analysis, the threshold inquiry is whether the prohibited advertising is truthful, nonmisleading speech. If the prohibited speech is false or misleading, it is not protected by the First Amendment and no further analysis is required. The state may prohibit false or misleading commercial speech. *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Though states may not absolutely prohibit commercial advertising that is merely potentially misleading, advertising that is inherently misleading or by experience has proved to be subject to abuse may be regulated. *In re R.M.J.*, 455 U.S. at 203.

A.

In Missouri, a licensed dealer may not advertise the price of a motor vehicle in relation to "invoice price." *12 C.S.R. 60-5.010(2)(M).* Here there is ample evidence to indicate that as used in the advertisement, "invoice price" is likely to deceive and is, therefore, inherently misleading.

At the administrative hearing, George Gurnett, a program administrator for the Commission with four years experience in the regulation of motor vehicle advertising, explained why the term "invoice price" misleads consumers:

> The invoice price . . . represents, and I may not be getting this exactly right . . . but I believe it represents a point for floor planning between the dealership and the floor planner. It [is] not necessarily the same as what most customers would equate invoice as being[,] the price a

> dealer paid the manufacturer for the vehicle. This is because the dealer has the opportunity for rebates, holdbacks and other incentives that would change the price that they ultimately pay their distributor for the vehicle. Because of this invoice, while it appears to represent the bottom line or what a dealer pays the manufacturer, it does not in most cases represent that.

The testimony of Mr. Gurnett is consistent with that of Scott R. Adams, the president of Adams Ford. Mr. Adams testified that invoice price is not the same as dealer cost, and that "nobody knows what dealer cost is." He explained that most dealers borrow money from Ford Motor Credit to finance cars placed on their lots. He stated that invoice price is the price that Ford Motor Credit pays Ford Motor Company for the vehicle on behalf of the dealer. However, as stated on the invoice displayed on each vehicle during Adams Ford's advertised promotion, the invoice price "may not reflect the final cost of the vehicle in view of the possibility of future rebates, allowances, discounts and incentive awards from Ford Motor Company to the dealer." When asked if he thought that customers equated invoice price with dealer cost, Mr. Adams admitted, "I don't know what a customer thinks."

From the above testimony, it is clear that in the automobile industry the term "invoice price" has a specialized, unique meaning. An "invoice" is generally understood to mean "an itemized statement furnished to a purchaser by a seller and [usually] specifying the price of goods and services and terms of sale." *Webster's Third New International Dictionary* 1190 (1981). "Invoice price" ordinarily means the price paid by the dealer for the

vehicle. However, as Adams Ford admits, within the automotive industry, invoice price does not reflect the dealer's price. That price is subject to manipulation by undisclosed dealer rebates, allowances or incentives. The term "invoice price" is inherently misleading as used in motor vehicle advertisements because of the peculiar meaning given the term by the automotive industry, which is at variance with the commonly understood meaning of the words.

In addition, the regulations give dealers wide latitude in advertising the price of their vehicles in meaningful, non-deceptive ways. A dealer may advertise the actual sale price of the vehicle or advertise the price in relation to the manufacturer's suggested retail "sticker price" displayed on the vehicle. *See 12 C.S.R. 60-5.010.* By contrast, no useful information is conveyed to the consumer by an advertisement of a vehicle with respect to invoice price. Thus, the regulations prohibit only the advertisement of price in a manner that is, at best, meaningless. The United States Supreme Court has indicated that "commercial speech that is devoid of intrinsic meaning may be inherently misleading, especially if such speech historically has been used to deceive the public." *Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 112 (1990) (Marshall, J. and Brennan, J., concurring).

The term "invoice price" in a motor vehicle advertisement is inherently misleading and, therefore, beyond First Amendment protection. The holding here is consistent with that in *Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Commission,* 24 F.3d 754 (5th Cir. 1994), and *Barry v. Arrow Pontiac, Inc.,* 494 A.2d 804 (N.J. 1985). In both of

these cases, the courts employed a similar analysis to uphold the constitutionality of regulations prohibiting the use of the term "invoice" in automobile advertising.

B.

Adams Ford also challenges 12 C.S.R. 60-5.01(2)(AA) on First Amendment grounds. This regulation prohibits "reference to matching or bettering competitors' prices in any advertisement unless all limitations are conspicuously disclosed." The regulation further prohibits price matching or bettering policies that "place an unreasonable burden on the consumer."

Adams Ford was disciplined by the Commission under this regulation for failing to clearly and conspicuously disclose all limitations in its April 2, 1994, advertisement, which read: "$5,000 GUARANTEES THAT WE WILL BEAT ANY DEAL, ANY WHERE, ANYTIME." This advertisement was supposed to contain a sentence that advised the consumer that further details were available at the store. In a letter to Adams Ford, the *Kansas City Star* acknowledged its error in omitting the disclaimer stating, "see dealer for details."

Adams Ford concedes that all of the relevant terms were not disclosed in the advertisement itself. However, it points out that a copy of the written policy was posted at the dealership and a copy was made available to any customer who wished to view it. It is further asserted that the numerous terms and conditions were too voluminous to publish in the advertisement. It argues that the regulation's requirement that all terms be clearly and conspicuously disclosed imposes an undue burden on dealers and,

as a result, has a chilling effect on Adams Ford's right to free speech.

The advertisements prohibited by the regulations are not protected by the First Amendment because they are inherently misleading and subject to abuse by motor vehicle dealers. The terms and conditions of Adams Ford's price matching policy would likely exclude most customers from availing themselves of the "guarantee." The price matching policy reveals that the offer was subject to twenty terms and conditions. Among the conditions was the limitation that the "offer expires at the close of business the day the ad runs, unless extended by a new advertisement." The customer was also required to "have made a deposit on the car at the other store." In his testimony before the hearing officer, Mr. Gurnett explained why this restriction would prohibit most customers from benefiting from the so-called "guarantee":

> Generally when a customer makes a deposit on a vehicle at a dealership, they are usually locked in at that point into purchasing that car or they will lose their deposit. I feel that at that point, a dealer who would offer to beat a price would have no problem beating any price, because they know that in order for the customer to take advantage of the guarantee that they would have to lose a deposit at another store.

Because the terms and conditions of a price matching policy may render a "guarantee" illusory, advertisements that refer to price matching are inherently misleading and likely to be subject to abuse unless accompanied by a full and fair disclosure of the terms of the price matching

policy. Because such advertisements are inherently misleading, they are not protected by the First Amendment.

Adams Ford further asserts that a narrowly tailored regulation, such as requiring the dealer to provide a copy of its policy to each customer, would amply protect the state's interest without overly burdening its right to free speech. This regulation is narrowly tailored to achieve the state's goal of full and fair disclosure. Here there is no absolute prohibition of price matching. The regulation merely requires full disclosure of the details. That remedy is preferred over a complete prohibition. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). Furthermore, this argument fails to take into consideration the burden placed on the unwitting consumer who arrives at the dealership with a bona fide advertised price of another dealer, only to be disappointed to learn that the price matching "guarantee" does not apply because the consumer arrived a day after the running of the advertisement, or that the consumer could not take advantage of the "guarantee" because no down payment had been made on a vehicle at another dealership. The regulation is narrowly designed to prevent such baiting of consumers.

VII.

In its final point, Adams Ford argues that the Commission lacks statutory authority to discipline it because there was no finding that the advertisements were false. The Commission may take disciplinary action against licensed dealers for certain conduct, including "[o]btaining or attempting to obtain any money . . . by fraud, deception, or misrepresentation" or for publishing "any

advertisement or solicitation which is false[.]" *Sec. 301.562.2(5)* and *sec. 301.562.2(11).*

Adams Ford concedes that the Commission may prohibit false advertising, but argues that the Commission lacks authority to discipline it for advertising that is misleading. The adjective "false" describes not only things that are "not truthful," but also things that are "deceptive," "illusory" or that have a tendency to "mislead." *Webster's Third New International Dictionary* 819 (1981). Likewise, the words "deception" and "misrepresentation" are used to refer to misleading acts. "Deception" is defined as "the act of . . . misleading," *id.* at 585, and "misrepresentation" as a "misleading representation," *id.* at 1445. The statutory language indicates a legislative intent to prohibit not only advertising that is patently untruthful, but also advertising that is inherently misleading. Thus, the Commission acted within its authority in reprimanding Adams Ford for its advertisements.

VIII.

The judgment is affirmed.

JOHN C. HOLSTEIN, Chief Justice

All concur.

APPENDIX B

[LOGO]

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(573)751-4144

June 17, 1997

Mr. Robert O. Jester
Ms. Sharon Kennedy
2121 City Center Square
1100 Main Street
Kansas City, Missouri 64105

In re: Adams Ford Belton, Inc., vs. Missouri Motor Vehicle Commission Missouri Supreme Court No. 79563

Dear Counsel:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Yours very truly,

THOMAS S. SIMON

/s/ Christina S. Vinson
Christina S. Vinson
Deputy Clerk, Court en Banc

cc: Mr. Stephen Martin, II/Missouri Attorney General

No. 79563
Circuit Court Case No. Cv194-1312CC

In the Supreme Court of Missouri

May *Session*, 1997

Adams Ford Belton, Inc.,

Appellant,

vs.

Missouri Motor Vehicle Commission,

Respondent

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form of aforesaid, by the said Circuit Court of Cole County *rendered, be in all things affirmed, and stand in full force and effect; and that the said* Respondent *recover against the said* Appellant *costs and charges herein expended and have therefor execution.*

(Opinion filed.)

STATE OF MISSOURI – Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme

Court, entered of record at the May *Session thereof,* 1997, *and on the* 27th *day of* May 1997, *in the above entitled cause.*

Given Under my hand and seal of said Court, at the City of Jefferson City, this 27th *day of* May 1997.

/s/ Thomas F. Simon *Clerk*

/s/ Cynthia L. Turley *D.C.*

APPENDIX C

[LOGO]

In the
Missouri Court of Appeals
Western District

ADAMS FORD BELTON, INC.	)	
Appellant,	)	WD 52837
v.	)	Filed: December 24, 1996
MISSOURI MOTOR VEHICLE COMMISSION,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

The Honorable Patricia Joyce, Judge

Adams Ford Belton, Inc., appeals the Missouri Motor Vehicle Commission's decision to discipline Adams Ford's motor vehicle dealer license for violating state advertising regulations. Adams Ford contends that the regulations were unconstitutional and that the commission acted without jurisdiction because it did not find that Adams Ford's advertisements were false. It also complains about the circuit court's failure to make certain findings of fact when it reviewed the commission's decision. Because Adams Ford presents a real and substantial issue of the constitutionality of one of the commission's regulations, we transfer the case to the Supreme Court of Missouri.

Adams Ford is a car dealership. On Saturday, April 2, 1994, it placed an advertisement in a Kansas City newspaper: "$5,000* GUARANTEES WE WILL BEAT ANY DEAL, ANY WHERE, ANY TIME." The asterisk referred to smaller print which said, "ALL APPLICABLE REBATES TO DEALER[.]" Other conditions applied, but they did not appear in the ad. On May 28, 1994, Adams Ford placed another advertisement in the same newspaper: "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK[.]"

In August 1994, the commission filed a complaint against Adams Ford alleging that the two advertisements violated the commission's advertising regulations, 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.010(2)(M). Regulation 12 C.S.R. 60-5.010(2)(AA) says, "Licensees shall not make any reference to matching or bettering competitors' prices in any advertisement unless all limitations are clearly and conspicuously disclosed. Any policy shall not place an unreasonable burden on the consumer[.]" Regulation 12 C.S.R. 60-5.010(2)(M) says, "Licensees shall not advertise a motor vehicle with regards to the invoice price, dealer cost, or any similar term or phrase as consumers equate invoice with cost which is misleading and prohibited[.]" The commission asserted that § 301.562.2(6), RSMo 1994,[1] authorized it to discipline Adams Ford's motor vehicle dealer license.

On October 28, 1994, the commission's hearing officer held a hearing. The hearing officer concluded that

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[1] That section says that the commission may discipline licensees for "[v]iolation of any lawful rule or regulation adopted pursuant to sections 301.550 to 301.572[.]"

Adams Ford violated 12 C.S.R. 60-5.010(2)(AA) and ordered that a private letter of admonition be issued. They [sic] hearing officer also determined that Adams Ford violated 12 C.S.R. 60-5.010(20(M) and ordered that Adams Ford's motor vehicle dealer's license be suspended for two days. Adams Ford filed its application for review with the commission. The commission found that the facts did not support the hearing officer's decision to impose a two day suspension. The commission ordered that Adams Ford be issued a private reprimand for both of the violations of the regulations.

Before the hearing with the commission, Adams Ford filed a declaratory judgment action with the circuit court alleging that the commission's regulations violated its constitutional rights. After the hearing, it also filed a petition seeking review of the administrative hearing with the circuit court. The circuit court consolidated the cases, and the parties agreed that the record of the administrative hearing would serve as the record for the disposition of the declaratory judgment case and the administrative review case. The circuit court upheld the constitutionality of the advertising regulations and affirmed the final decision of the commission.

The Supreme Court has exclusive jurisdiction of all cases involving the validity of a statute. Mo. Const. art. V, § 3 (1945). Duly-promulgated regulations have the force and effect of statutes; therefore, review of a regulation's constitutionality also falls within the Supreme Court's exclusive jurisdiction. *Department of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 329, 332 (Mo. banc 1985); *Casada Villa of Missouri, Inc. v. Department of Social Services*, 868 S.W.2d 157, 160 (Mo. App. 1994). If any point

on appeal involves such an issue, the entire case must be transferred to the Supreme Court. *In re Estate of Potashnick*, 841 S.W.2d 714, 718 (Mo. App. 1992) (citing *State ex rel. Union Electric v. Public Service Commission*, 687 S.W.2d 162, 165 (Mo. banc 1985)). If the constitutionality issue is substantial, and not merely colorable, exclusive jurisdiction rests with the Supreme Court. *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 530-31 (Mo. App. 1988). A claim is:

> [S]ubstantial when, upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but, if such preliminary inquiry discloses that the contention is so obviously unsubstantial and insufficient, either in fact or in law, as to be plainly without merit and a mere pretense, the claim may be deemed to be merely colorable.

Kansas City Star Company v. Shields, 771 S.W.2d 101, 103 (Mo. App. 1989) (quoting *State v. Egan*, 272 S.W.2d 719, 725 (Mo. App. 1954)). *See also Postashnick*, 841 S.W.2d at 718.

Adams Ford contends that the commission's regulation, 12 C.S.R. 60-5.010(2)(M) violates its rights of free speech guaranteed by the U.S. CONST. amend. I and MO. CONST. art. I, § 8 (1945). It claims that the regulation is unconstitutional because: (1) its advertisement was truthful, (2) "invoice" is not inherently misleading – only potentially misleading; and (3) the commission's proscription of "invoice" is not narrowly-tailored to serve an important state interest.

The parties agree that the advertisements involve commercial speech and that commercial speech receives less protection than non-commercial speech. *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 477 U.S. 557, 563 (1980). In analyzing commercial speech cases, the courts use this four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[2]

Id. at 566. As the *Central Hudson* court explained, "[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it[.]" *Id.* at 563.

Determining whether the use of "invoice" in a car dealer's advertisements is more likely to deceive the public rather than inform it presents a real and substantial

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[2] The Supreme Court explained that the last prong of the test requires "a 'fit' between the legislatures ends and the means chosen to accomplish those ends, . . . a fit that is not necessarily perfect, but reasonable[.]" Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

constitutional issue. We, therefore, transfer the case to the Supreme Court for its determination.[3]

Paul M. Spinden, Judge

Smart, P.J., and Ellis, J., concur.

[3] Although Adams Ford challenged the regulations on other constitutional grounds, its free speech challenge to 12 C.S.R. 60-5.010(2)(M) was the only constitutional challenge which we found to be real and substantial.

APPENDIX D

IN THE CIRCUIT COURT OF COLE COUNTY STATE OF MISSOURI

ADAMS FORD BELTON, INC., Plaintiff, v. MISSOURI MOTOR VEHICLE COMMISSION, Defendant.	) Case No.	CV194-1312CC CV195-665CC Consolidated

ORDER

Now on this day, having reviewed the pleadings and briefs of counsel and after hearing oral argument, the undersigned judge of the Circuit Court of Cole County, finds that:

(1) Commission Regulations 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) are permissible under the Equal Protection Clause of the United States Constitution and the Constitution of the State of Missouri in that the regulations do not create suspect classifications or infringe upon fundamental rights;

(2) Commission Regulations 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) are permissible under the Privileges and Immunities Clause of the United States Constitution in that the Plaintiff failed to establish a violation;

(3) Commission Regulation 12 C.S.R. 60-5.020(2)(M) does not violate the Plaintiff's

rights under the First Amendment to the Constitutions of the United States of America and the State of Missouri in that it is constitutionally valid as it does not infringe on Plaintiff's First Amendment Rights to engage in protected commercial speech.

WHEREFORE, IT IS ORDERED, this Court finds in favor of Defendants Missouri Motor Vehicle commission, Bill Best, Tom Calder, Jack Chance, Sandra Focht, Bill McMurray, Carl Richardson and Don White and against Plaintiff Adams Ford Belton, Inc in the declaratory judgment case (CV 194-1312CC) and the consolidated administrative review case (CV195-665CC), affirming the final decision of the Defendant Missouri Motor Vehicle Commission's decision and upholding the constitutionality of 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) as permissible under the Equal Protection Clause of the United States and Missouri State Constitutions, the Privileges and Immunities Clause of the United States Constitution and the First Amendment of the United States and Missouri State Constitutions.

This order is final as of this date.

SO ORDERED this 17th day of May , 1996.

/s/ Patricia Joyce
Patricia Joyce
Judge

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

I, LINDA L. ROARK, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of
Order
as fully as the same remains of record in my said office.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 17th day of May 1996 .
LINDA L. ROARK, Clerk

ILLEGIBLE By /s/ Shawn Morgan
Deputy Clerk

APPENDIX E

IN THE CIRCUIT COURT OF COLE COUNTY STATE OF MISSOURI

ADAMS FORD BELTON, INC., Plaintiff,	)	Case No. CV194-1312CC CV195-665CC Consolidated
v.	)	
MISSOURI MOTOR VEHICLE COMMISSION, Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

On October 21, 1994, Plaintiff filed its Petition for Declaratory Judgment and Request for Stay of Administrative Proceedings in Case No. CV194-1312CC. On October 26, 1994, the Court found that the administrative hearing would not unduly burden Plaintiff, and the Request for Stay was denied.

The Administrative proceeding ran its course as detailed below, resulting in a sanction against Plaintiff's license. Plaintiff filed a companion action pursuant to Section 536.140, RSMo in Case No. CV195-0665 which was dismissed on December 18, 1995 for failure to prosecute. The administrative review case was reinstated and consolidated with the declaratory judgment case under the Court's Order dated January 12, 1996. The parties agreed that the record of the administrative proceeding

serve as the record for the disposition of both the declaratory judgment case and the administrative review case. The parties also agreed to a schedule for briefs and oral argument was held.

Findings of Facts

1. Plaintiff Adams Ford Belton, Inc. ("Plaintiff") is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Missouri.

2. Plaintiff is, and at all times relevant hereto, engaged in the business of a motor vehicle dealership.

3. Defendant Missouri Motor Vehicle Commission (the "Commission") is a Type III commission within the Missouri Department of Revenue, and which was created by RSMo § 301.553 (1992).

4. Defendants Bill Best, Tom Calder, Jack Chance, Sandra Focht, Bill McMurray, Carl Richardson and Don White, are, and at all times hereinafter mentioned were, members of the Missouri Motor Vehicle Commission, and each are sued in this/her [sic] official capacity as a member of the Missouri Motor Vehicle Commission. (The named individual defendants, together with Defendant Missouri Motor Vehicle Commission, are hereinafter collectively referred to as the "Commission").

5. The Commission is responsible for the licensing and regulation of all manufacturers, motor vehicle dealers and boat dealers pursuant to RSMo §§ 301.550-301.572.

6. Plaintiff is, and at all times relevant hereto, was, duly licensed by the Commission.

7. On Saturday, April 2, 1994, Plaintiff placed an advertisement in the *Kansas City Star,* which read: "$5,000* GUARANTEES THAT WE WILL BEAT ANY DEAL, ANY WHERE, ANY TIME," a copy of which advertisement is attached hereto as "Exhibit A" and incorporated herein by reference.

8. On May 28, 1994, Plaintiff placed an advertisement in the *Kansas City Star* which read: "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK," a copy of which advertisement is attached hereto as "Exhibit B" and incorporated herein by reference.

9. The *Kansas City Star* is a newspaper published in the State of Missouri that is distributed in both the States of Missouri and Kansas.

10. On or about August, 1994, the Commission filed its Complaint against Plaintiff alleging violations of its advertising rules and regulations.

11. Count I of the Complaint alleged that an advertisement placed on [sic] Defendant in the *Kansas City Star* on April 2, 1994, which stated: $5,000* GUARANTEES WE WILL BEAT ANY DEAL, ANY WHERE, ANY TIME," constituted a violation of 12 C.S.R. 60-5.010(2)(AA). That regulation provides:

> Licensees shall not make any reference to matching or bettering competitors' prices in any advertisement unless all limitations are clearly and conspicuously disclosed. Any policy shall

> not place an unreasonable burden on the consumer.

12. Count II of the Complaint alleged that an advertisement placed on [sic] Defendant in the *Kansas City Star* on May 28, 1994, which read: "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK," constituted a violation of 12 C.S.R. 60-5.010(2)(M), which provides:

> Licensee shall not advertise a motor vehicle with regards to the invoice price, dealer cost, or any similar term or phrase as consumers equate invoice with cost which is misleading and prohibited.

13. The Commission has the authority to discipline Plaintiff for the foregoing alleged violations pursuant to RSMo § 301.562.2(6) which provides that the Commission may discipline licensees for:

> (6) Violation of, or assisting or enabling any person to violate any provisions of sections 301.550 to 301.572 or of any lawful rule or regulation adopted pursuant to sections 301.550 to 301.572.

14. On October 28, 1994, a hearing on this matter was held before William B. Gillespie (The "Hearing Officer") at which hearing Plaintiff and the Commission each presented their evidence.

15. On or about February 9, 1995, the Hearing Officer issued his Order (hereinafter the "Order"), finding and ordering as follows:

a. Plaintiff violated 12 C.S.R. 60-5.010(2)(AA), and ordered that a private letter of admonition be issued to Plaintiff; and

b. Plaintiff violated 12 C.S.R. 60-5.010(2)(M), and ordered that Plaintiff's license to operate as a Motor Vehicle Dealer within the State of Missouri be suspended for two days. Order, attached hereto as "Exhibit E" and incorporated herein by reference.

16. On February 23, 1995, Plaintiff filed its Application for Review of the Hearing Officer's Order with the Commission.

17. Plaintiff's Application for Review was considered by the Commission. On May 23, 1995, the Commission entered its Opinion that the facts did not support the Hearing Officer's decision to impose a two-day suspension. The Commission therefore set aside the Hearing Officer's Order of February 9, 1995, and ordered that Plaintiff be issued a private reprimand for its violations of both 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M).

Conclusions of Law

I.

The Commission's Regulations Are Permissible Under the Equal Protection Clause of the Constitution of the United States of America and the State of Missouri

A regulation will withstand an equal protection constitutional challenge if it does not create suspect classifications and does not impinge upon fundamental rights, so long as the classification bears some rational relationship to a legitimate state purpose. A fundamental right is a right that is explicitly or implicitly guaranteed by the Constitution and includes the rights to free speech, to vote, freedom of interstate travel, the right to personal

privacy and other basic liberties. A suspect classification is one with the purpose or effect of creating classes based on certain characteristics that are inherently suspect in a constitutional sense. They are classes based upon race, national origin or illegitimacy, which because of historical reasons, command extraordinary protection. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. 1991) (citations omitted). Plaintiff fails to establish that 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) create suspect classifications or impinges [sic] upon fundamental rights; therefore, any facial and or as applied equal protection challenges are without merit and must fail. Neither 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) touches upon fundamental rights nor burdens suspect classes. Further, the regulations do not create any classifications of motor vehicle dealers. All motor vehicle dealers engaged in business in Missouri are required to follow the same regulations. Thus, no classifications are created by the regulations.

Moreover, even if the regulations did create classifications among motor vehicle dealers, and even if Plaintiff raised such a challenge, a regulation will withstand an equal protection challenge so long as the classification is *rationally related* to a legitimate state interest. *Id. See also, Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1992). The State has a compelling interest in protecting the health, safety and welfare of the citizens of Missouri. By investigating questionable advertising practices of motor vehicle dealers and pursuing investigations, the Commission furthers the State's interest in ensuring that citizens receive truthful, non-deceptive information concerning lawful commercial transactions involving motor

vehicle dealers. The furtherance of that goal is a legitimate state interest. Thus, Plaintiff's facial equal protection challenge to the statute must fail.

Not only do 12 C.S.R. 60-5.10(2)(AA) and 12 C.S.R. 60-5.020(2)(M) comply with constitutional equal protection requirements on their face, they were also constitutionally applied to Plaintiff. In order to prevail on an as applied equal protection claim, Plaintiff must establish that he was singled out and compelled to comply with a statute's provisions while others similarly situations [sic] were not so compelled and that he was singled out because of an impermissible purpose such as race, religion, or the exercise of a fundamental right. *See Bender v. City of St. Ann*, 816 F. Supp. 1372, *aff'd* 36 F.3d 57, *reh'g denied* (E.D. Mo. 1994). Plaintiff does not demonstrate that he is in a protected class or that a fundamental right has been affected, nor does he demonstrate that he has been singled out for adverse treatment by the Commission.[1] No fundamental right, nor protected class is involved. Therefore, Plaintiff must establish that the Commission's action had no reasonable basis, that it was essentially arbitrary. *Collins v. Director of Revenue*, 691 S.W.2d 246 (Mo. 1985). *See also Christopher Lake Development v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994); *Basket, Levy & Fine, Inc. v. St. Louis Thermal Energy*, 21 F.3d 237 (8th Cir. 1994); *Spudich v. Smarr*, 931 F.2d 1278 (8th Cir. 1991), *cert denied* 502 U.S. 866 (1990).

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[1] *Boyle v. City of Liberty*, 833 F. Supp. 1436 (W.D. Mo. 1993); *Forty Mill Realty Venture v. State ex. rel. Missouri Highway and Transportation Department*, 872 S.W.2d 528 (Mo.App E.D. 1994).

The real question at issue is whether the Commission's ability, after a hearing, to discipline the Plaintiff for improper automobile advertising is rationally related to a legitimate state interest?" Clearly, the answer is "yes". The state has an important interest in protecting the health, safety, and welfare of its public. Therefore, any minimal infringement or inconvenience imposed upon Plaintiff is justified due to the public concerns involved. Plaintiff cannot establish, and does not allege, that the Commission acted irrationally or arbitrarily in pursuing protection of the public.[2] Plaintiff fails to meet the basic requirements to raise an equal protection claim as to the application of 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M). Therefore, both facially and as applied the Plaintiff's equal protection challenges must fail.

Plaintiff attempts to assert the advertising regulations in question are invalid because they are not enforced against non-residents. Plaintiff poses the example of a Kansas dealer which is not regulated because they are not a Missouri licensee advertising in a paper that is available in Missouri. If we were to follow the Plaintiff [sic] view, all states would have to have exactly the same regulations because each state would be required to treat all bordering state's citizens identically, regardless of whether there is statutory authority to regulate a non-resident. If the advertising regulations were not identical among states or allow regulation for non-residents, then no state could regulate advertising. The intent of

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[2] Deference should be given to the government to determine what is a legitimate purpose and the appropriate means to achieve it. *Stiles v. Blunt*, 912 F.2d 260 (8th Cir., 1990) *cert denied* 499 U.S. 919 (1991).

the Equal Protection Clause is to protect suspect classifications and fundamental rights, not to mandate identical regulations among states.

The Commission is given its powers by the Legislature under Chapter 301, RSMo. Under Chapter 301, the Commission has the authority to enforce its statutes, rules and regulations against violations by licensees. In enacting its advertising regulations, the Commission proscribes activities that mislead or confused Missouri customers. Any person desiring to sell motor vehicles in Missouri must be licensed with the Commission. Section 301.559, RSMo 1994. All persons licensed by the Commission are subject to 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M). There is no separate classifications among the motor vehicle dealers in Missouri. By enforcing 12 C.S.R. 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) against all Missouri motor vehicle dealers, the Commission's regulations are rationally related to serving the governmental interest of protection the public from misleading advertising such as issued by the Plaintiff in this case. Every motor vehicle dealer licensed by the state doing business in Missouri is treated the same. Plaintiff has failed in its burden to show a suspect classification or fundamental rights has been violated and cannot sustain it [sic] Equal Protection allegation.

II.

The Commission's Regulations are Permissible Under the Privileges and Immunities Clause.

Plaintiff admits that cases involving the Privileges and Immunities Clause have yet to support the theory presented by the Plaintiff. Further, the Plaintiff only alleges that "Certainly, the Privileges and Immunities Clause requires that, as the price for receiving the benefits of the State, non-residents within the State's borders must abide by the same 'duties, impositions and restrictions' as residents." The Plaintiff is only entitled to summary judgment if "the moving party is entitled to judgment as a matter of law." Rule 74.04(c). Plaintiff has failed to make a showing that the Privileges and Immunities Clause is violated by the Commissions regulations and cannot prevail under this theory.

III.

The Commission [sic] Regulation Does Not Violate the Plaintiff's First Amendment Rights Under the Constitutions of the United States of America and the State of Missouri.

The Commission properly determined the Plaintiff violated 12 C.S.R. 60-5.010(2)(M) by placing an advertisement in the Kansas City Star stating "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK" because the advertisement is inherent [sic] misleading. Automobile advertisements that use the term "invoice" are inherently misleading and receive no protection under the First Amendment. *Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Commission,* 24 F.3d 754 (5th Cir. 1994).

As a result of the Plaintiff's violation of 12 C.S.R. 60-5.010(2)(M), the Commission entered its order issuing a private reprimand to Plaintiff. Exhibit F. The Plaintiff attempts to argue, but fails to convince, that 12 C.S.R. 60-5.010(2)(M) violates that First Amendment by failing to meet the constitutional tests set forth for commercial speech. The test for commercial speech is as follows: (1) The first inquiry is whether the speech concerns lawful activity and is truthful and not misleading; (2) the governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted, and (4) there must be a "reasonable fit" between the asserted state interest and the restriction on commercial speech. *Board of Trustees v. Fox*, 492 U.S. 469 (1989).[3]

12 C.S.R. 60-5.010(2)(M) clearly involves commercial speech. Commercial speech receives less protection than non-commercial speech. *In Re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937 (1982). "[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience had proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising

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[3] The Court modified the fourth element of the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343 (1980). The Court stated that "[w]hat our decisions require is a " 'fit' between the legislatures ends and the means chosen to accomplish those ends, . . . a fit that is not necessarily perfect, but reasonable." *Fox*, 492 U.S. at 480. (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 241 (1986) (upholding a statute that prevented the advertisements of gambling facilities to residents of Puerto Rico)).

may be prohibited entirely." *Id.* A statement is "inherently" misleading when "the particular method by which the information is imparted to consumer is inherently conducive to deception and coercion." *Peel v. Attorney Disciplinary Commission,* 496 U.S. 91, 112, 110 S.Ct. 1681, 1697 (1990) (Marshall. J. and Brennan, J. concurring). "[A] statement is actually or inherently misleading when it deceives or is inherently likely to deceive." *Joe Conte Toyota,* 24 F.3d at 756.

In *Joe Conte Toyota,* the United States Court of Appeals for the Fifth Circuit decided the same first amendment issue raised by the Plaintiff in this case. *Id.* at 754-758. The issue on appeal in *Joe Conte Toyota* was whether the lower court has correctly upheld the constitutionality of a state regulation prohibiting any automobile advertisements which contain the term "invoice" on the ground that the term is inherently misleading and beyond First Amendment protection. *Id.* at 754. The Appellant proposed to run an advertisement offering automobiles for sale "$49.00 OVER FACTORY INVOICE." *Id.* at 755. The advertisement included a disclaimer stating "Dealer invoice may not reflect actual dealer cost". *Id.* Appellant also proposed an alternative disclaimer stating "Invoice price indicates amount dealer paid for car. Due to various factory rebates, holdbacks and incentives, actual dealer cost is lower than invoice price." *Id.* Appellant argued that a wholesale ban on the term "invoice" was more extensive than necessary to serve the state's interest in protecting the public. *Id.*

The Fifth Circuit, based on a review of commercial speech jurisprudence, stated that a statement is actually or inherently misleading when it deceives or is inherently

likely to deceive. *Id.* at 756. The Court held that the term "invoice" as a minimum is likely to deceive and is therefore inherently misleading. *Id.* The Court noted that due to various invoice prices, holdbacks, incentives and rebates, "the invoice amount bears little relation to the dealer's true cost [sic] and "conveys no useful information to the consumer." *Id.* "To the extent that the term "invoice" provides any information to the consumer, it is misleading; its use can only be intended to confuse the invoice amount with the dealer's actual cost." *Id.* at 757. The Fifth Circuit concluded that, as the word "invoice" is "calculated to confuse the consumer," it is "inherently misleading and not entitled to protection under the First Amendment."[4] *Id.* at 758.

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[4] Prior to the *Joe Conte Toyota* decision, the Supreme Court of New Jersey addressed the constitutionality of a prohibition of the term "invoice" in automobile advertising. The New Jersey Court held that the terms "dealer invoice" and "invoice" contained in automobile advertisements were misleading and beyond First Amendment protection. See *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 494 A.2d 804 (1985). The Court held:

> [T]he term "dealer invoice" has no fixed, ascertainable meaning to the average consumer. The holdbacks and other rebates subsequently recovered by the dealer imbue the term "dealer invoice" with the same defects sought to be avoided by the proscription against the "use in any advertisement of a comparison to the dealer's cost or inventory price" – that is, the cost as advertised is not the ultimate cost of the automobile to the dealer. In the context of the sale of new automobiles, we find that the "cost," "inventory," and "invoice" are equally amorphous, and hence equally misleading to the public. Id. at 71-72.

Because the use of the word "invoice" is inherently misleading, the Plaintiff cannot surpass the first hurdle in the *Central Hudson*, as modified by *Fox*, test for commercial speech. Consequently, there is no need for the court to consider the remaining prongs of the test. *Joe Conte Toyota*, 24 F.3d at 758. The Commission regulation, 12 C.S.R. 60-5.010(2)(M), is constitutionally valid as is [sic] does not infringe on Plaintiff's First Amendment rights to engage in protected commercial speech.

Conclusion

The Court finds in favor of the Defendants and concludes that:

(1) Commission Regulations 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) are permissible under the Equal Protection Clause of the United States Constitution and the Constitution of the State of Missouri in that the regulations do not create suspect classifications or infringe upon fundamental rights;

(2) Commission Regulations 12 C.S.R. 60-5.01(2)(AA) and 12 C.S.R. 60-5.020(2)(M) are permissible under the Privileges and Immunities Clause of the United States Constitution in that the Plaintiff failed to establish a violation;

(3) Commission Regulation 12 C.S.R. 60-5.020(2)(M) does not violate the Plaintiff's rights under the First Amendment to the Constitutions of the United States of America and the State of Missouri in that it is constitutionally valid as it does not infringe on Plaintiff's First

Amendment Rights to engage in protected commercial speech.

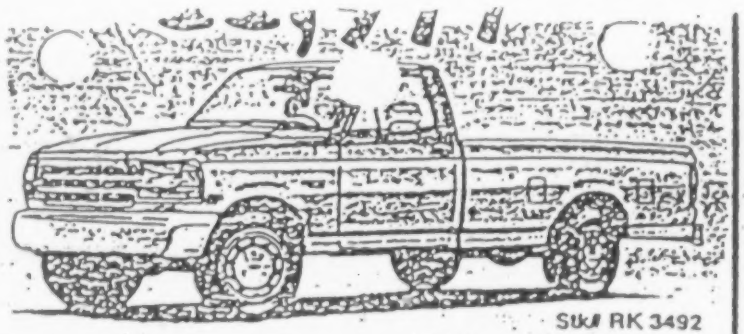
/s/ Patrica Joyce
Patrica Joyce
Judge

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

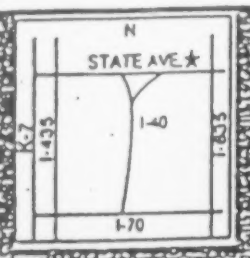
I, LINDA L. ROARK Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of findings of fact & conclusions of law as fully as the same remains of record in my said office. IN WITNESS WHEREOF, I have hereunto see my hand and affixed the seal of my said office this 17th day of May 1996
LINDA L. ROARK, Clerk

Circuit Court of Cole
County, Missouri

By/s/ Sharon Morgan
Deputy Clerk



- Power Steering
- Power Brakes
- Fuel Injection
- Long bed
- Rear ABS
- AM/FM Stereo



Laird Noller

FORD

6736 State Ave, Kansas City, KS

334-0011

Plus Freight

ADAMS ADAMS ADAMS ADAMS ADAMS

$500* GUARANTEES

WE WILL BEAT ANY DEAL, ANYWHERE, ANY TIME.

$49 PER MO.*

AND

$49 DOWN

ON ANY VEHICLE IN STOCK

(THIS IS NOT A LEASE)

ADAMS FORD BELTON

S. 71 HWY AT 291 EXIT 322-6000

BEST AVAILABLE COPY

EXHIBIT A

E-18 The Kansas City Star Saturday, May 28, 1994
Eagle 1342 Ford 1347

ADAMS Ford BELTON'S
MEMORIAL DAY MADNESS
TIME IS RUNNING OUT SALE...
OPTION 1 NO PAYMENTS TILL AUGUST (WITH APPROVED CREDIT)
OPTION 2 $100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK
OPTION 3 RATES AS LOW AS 4.9% A.P.R. ON SELECTED UNITS
Roy says "Take this one time opportunity to buy at below factory prices. This is one of our LARGEST INVENTORY reductions EVER! We will not be undersold. All sale prices good through May 31, 1994."
IT'S A BETTER BUY IN BELTON
ADAMS Ford BELTON
816-322-3686
5 MI. SOUTH OF BLUE RIDGE MALL
HURRY FOR BEST SELECTION

EXHIBIT D

APPENDIX F

(Seal)

MISSOURI MOTOR VEHICLE COMMISSION

POST OFFICE BOX 43
JEFFERSON CITY
65102
(314) 751-8343
FAX (314) 751-4789

MEL CARNAHAN
GOVERNOR

JANETTE LOHMAN
DIRECTOR, REVENUE

COMMISSION MEMBERS:

GREGORY C. MITCHELL
EXECUTIVE DIRECTOR

BILL BEST
TOM CALDER
JACK CHANCE
SANDRA FOCHT
BILL McMURRAY
CARL RICHARDSON
DON WHITE

Opinion

The Missouri Motor Vehicle Commission, pursuant to 12 CSR 60-4.080, has reviewed Hearing Officer Gillespie's Findings of Fact and Conclusions of Law, dated February 9, 1995. The Commission is of the opinion that the Facts, Findings, and Conclusions set forth in Hearing Officer Gillespie's Order do not support the discipline therein imposed against Respondent's license, specifically the two-day suspension. Accordingly, the Commission sets aside Hearing Officer Gillespie's Order and, instead, **Hereby Orders** that Respondent be issued a private reprimand for its violations of 12 CSR 60-5.010(2)(AA) and 12 CSR 60-5.020(2)(M).

Dated this 23 day of May, 1995

/s/ Gregory C. Mitchell
Gregory C. Mitchell
Executive Director
Motor Vehicle
Commission

/s/ William McMurray
William McMurray
Motor Vehicle
Commission

APPENDIX G

BEFORE THE
MISSOURI MOTOR VEHICLE COMMISSION

IN RE THE MATTER OF:	)	
	)	Case No.: N-1016
ADAMS FORD BELTON, INC.	)	Advertising Violations
	)	
800 Quik Trip Way	)	William B. Gillespie, Esq.
Belton, Missouri	)	Hearing Officer
64012	)	

AMENDED ORDER

IT IS HEREBY ORDERED that for Respondent/ Licensee's conscious violation of 12 CSR 60-5.010(2)(AA) that a private letter of admonition be issued by the Commission.

IT IS HEREBY ORDERED that for Respondent/ Licensee's conscious violation of 12 CSR 60-5.010(2)(M) that its license to operate as a Motor Vehicle Dealer within the State of Missouri be suspended for a period of two (2) days said suspension to commence the 27th day of February, 1995.

Dated this 23 day of February, 1995.

/s/ William B. Gillespie
WM. B. GILLESPIE
HEARING OFFICER
MISSOURI MOTOR
VEHICLE COMMISSION

/s/ William McMurray
CHAIRMAN,
MISSOURI MOTOR
VEHICLE
COMMISSION

APPENDIX H

BEFORE THE MISSOURI MOTOR VEHICLE COMMISSION

IN RE THE MATTER OF:	Case No.: N-1016
ADAMS FORD BELTON, INC. 800 Quik Trip Way Belton, Missouri 64012	Advertising Violations William B. Gillespie, Esq. Hearing Officer
Appearances:	
For Petitioner: Mr. John T. Banjak, Esq. Assistant Attorney General 7th Floor Broadway State Office Building 221 W. High Street Jefferson City, Missouri 65102	
For Respondent/Licensee: Mr. Robert O. Jester, Esq. Ensz & Jester, P.C. 2121 City Center Square 1100 Main Street Kansas City, Missouri 64105	

ISSUE

The issue before the Hearing Officer is whether the Motor Vehicle Commission has cause to discipline Respondent/Licensee's license for violation of 12 C.S.R. 60-5.010(2)(AA) and/or 12 C.S.R. 60-5.010(2)(M).

STATEMENT OF THE FACTS

The parties hereto jointly stipulated as follows:

1. That Respondent/Licensee Adams Ford Belton is a duly licensed motor vehicle dealership operating through its principal owners Scott Adams and Ray Adams and conducts its business at 800 Quik Trip Way, Belton, Missouri 64012.

2. That on the 2nd day of April, 1994 Respondent/Licensee caused an advertisement to be placed in the *Kansas City Star* on page F-14 thereof. A copy of said advertisement is attached hereto as Exhibit A and is hereby incorporated herein.

3. That on the 28th day of May, 1994 Respondent/Licensee caused an advertisement to be placed in the *Kansas City Star* on page F-18 thereof. A copy of said advertisement is attached hereto as Exhibit B and is hereby incorporated herein.

4. That Respondent/Licensee maintained no written internal procedures and/or policies at any time relevant hereto.

Additional undisputed facts are:

5. That the Petitioner Missouri Motor Vehicle Commission is an agency of the State of Missouri having been created by §301.553 RSMo, and is responsible for the licensing and regulation of all manufacturers of motor vehicles, motor vehicle dealers and boat dealers pursuant to §§301.550 to 301.572 RSMo.

6. That Respondent/Licensee's dealership license (D-0047) was renewed by Petitioner on or about the 24th

day of November, 1993, and that Respondent/Licensee's license is active. Therefore, Petitioner has regulatory authority over Respondent/Licensee pursuant to §§301.550 to 301.572 RSMo.

7. That Petitioner Missouri Motor Vehicle Commission through the Attorney General of the State of Missouri caused to be filed a two-count Complaint against Respondent.

a. Count I of the aforesaid Complaint alleged that on or about Saturday, April 2, 1994 Respondent/Licensee caused an advertisement to be placed in the *Kansas City Star* on page F-14 thereof which included the following language:

"$5,000* GUARANTEES WE WILL BEAT ANY DEAL, ANYWHERE, ANY TIME."

At the bottom of the advertisement in considerably smaller print appeared: "*ALL APPLICABLE REBATES TO DEALER." See Exhibit A.

b. Count II of the aforesaid Complaint alleged that on or about Saturday, May 28, 1994 Respondent/Licensee caused an advertisement to be placed in the *Kansas City Star* on page F-18 thereof which included the following language:

"$100.00 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK."

See Exhibit B.

FINDINGS

8. That with respect to Count I of the Complaint a series of letters between Petitioner Missouri Motor Vehicle Commission and Respondent/Licensee (*See* Hearing

Exhibits F, G, H, I, J and K) commenced on or about the 5th day of April, 1994. The letter of April 5, furthermore, made reference to a previous letter from the Motor Vehicle Commission dated March 2, 1994 (*See* Exhibit E) ostensibly addressing the same or similar concerns. (*See* Exhibit F; page 1) This correspondence between Petitioner and Respondent/Licensee continued some sixty (60) days ending with Respondent/Licensee's letter of June 1, 1994 in which Respondent/Licensee asserted that it " . . . will continue to exercise all reasonable efforts to comply with the advertising regulations promulgated by the Missouri Motor Vehicle Commission." (*See* Exhibit K)

a. Testimony on behalf of Petitioner Missouri Motor Vehicle Commission by Mr. George Gurnett ("Gurnett") detailed the Commission's attitude concerning Count I of the Complaint, and what action, if any, had been taken by the Commission prior to hearing which addressed Count I of the Complaint. (*See* Transcript of Hearing beginning at about page 17. Inasmuch as the pages of the Transcript of Hearing are unnumbered all references to same will be to "about page ___").

b. Paragraph 4. of the Joint Stipulation of the parties (*See* Exhibit A) reveals that there was, prior to the time of the events leading to Count I of the Complaint, " . . . no internal written advertising policies . . . "

c. Testimony on behalf of Respondent Adams Ford Belton by Mr. Scott R. Adams which addressed Count I of the Complaint appears not to contradict that of Mr. George Gurnett noted above (*See* Transcript of Hearing beginning at about page 50, especially that beginning at about page 52).

d. Uncontroverted testimony of Mr. Greg Mitchell, Interim Executive Director of the Motor Vehicle Commission, to the effect that a publication entitled "A Guide to Complying with The Advertising Rules" had been mailed to all " . . . franchise dealers . . . along with their 1994 license . . . " (See Transcript of Hearing at about page 8).

9. That with respect to Count II of the Complaint, Exhibit B of the Complaint (which was also part of the Joint Stipulation) speaks for itself: "$100 OVER FORD FACTORY INVOICE ON ALL MODELS IN STOCK" appears in bold-face type in the approximate center of the advertisement.

CONCLUSIONS

10. That:

a. With respect to Count I of the Complaint the Hearing Officer is lead [sic] to the inexorable conclusion that Respondent Adams Ford Belton was well aware of the regulations as promulgated by 12 CSR 60-5.010(2)(AA) and chose to ignore same. Respondent was aware of the regulations, if through no other medium, inasmuch as the evidence presented indicates that Respondent received Exhibit D along with its license to operate for 1994.

b. With respect to Count II of the Complaint the Hearing Officer is compelled to conclude that Respondent/Licensee Adams Ford Belton consciously caused an advertisement to be placed in the *Kansas City Star* on page F-18 thereof on the 28th day of May, 1994 in clear contravention to 12 C.S.R. 60-5.010(2)(M).

11. That the Motor Vehicle Commission has cause to discipline Respondent/Licensee's license for violation of 12 C.S.R. 605-010(2)(AA) and 12 C.S.R. 60-5.010(2)(M).

ORDER

IT IS HEREBY ORDERED that for Respondent/ Licensee's conscious violation of 12 CSR 60-5.010(2) (AA) that a private letter of admonition be issued by the Commission.

IT IS HEREBY ORDERED that for Respondent/ Licensee's conscious violation of 12 CSR 60-5.010(2)(M) that its license to operate as a Motor Vehicle Dealer within the State of Missouri be suspended for a period of two (2) days.

Dated this _____ day of _____, 1995.

/s/ Wm. B. Gillespie
WM. B. GILLESPIE
HEARING OFFICER
MISSOURI MOTOR VEHICLE COMMISSION

/s/ William McMurray
CHAIRMAN,
MISSOURI MOTOR VEHICLE COMMISSION

APPENDIX I

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

ADAMS FORD BELTON, INC., 800 Quik Trip Way Belton, Missouri 64102 Plaintiff, vs. MISSOURI MOTOR VEHICLE COMMISSION, SERVE: Gregory C. Mitchell Executive Director 623 East Capitol Jefferson City, MO 65102 BILL BEST, as Member of the Missouri Motor Vehicle Commission SERVE AT: Missouri Motor Vehicle Commission 623 East Capitol Jefferson City, MO 65102 TOM CALDER, as Member of the Missouri Motor Vehicle Commission SERVE AT: Missouri Motor Vehicle Commission 623 East Capitol Jefferson City, MO 65102 JACK CHANCE, as Member of the Missouri Motor Vehicle Commission SERVE AT: Missouri Motor Vehicle Commission 623 East Capitol Jefferson City, MO 65102	Case No. CV195-665CC (Filed June 19, 1995)

SANDRA FOCHT, as Member of the Missouri Motor Vehicle Commission
SERVE AT:
Missouri Motor Vehicle Commission
623 East Capitol
Jefferson City, MO 65102

BILL McMURRAY, as Member of the Missouri Motor Vehicle Commission
SERVE AT:
Missouri Motor Vehicle Commission
623 East Capitol
Jefferson City, MO 65102

CARL RICHARDSON, as Member of the Missouri Motor Vehicle Commission SERVE AT:
Missouri Motor Vehicle Commission
623 East Capitol
Jefferson City, MO 65102

and

DON WHITE, as Member of the Missouri Motor Vehicle Commission
SERVE AT:
Missouri Motor Vehicle Commission
623 East Capitol
Jefferson City, MO 65102

Defendants.

PETITION FOR REVIEW

COMES NOW Plaintiff Adams Ford Belton, Inc., and for his Petition for Review against the Missouri Motor Vehicle Commission, states as follows:

1. Plaintiff Adams Ford Belton, Inc. ("Plaintiff") is, and at all times hereinafter mentioned was, a corporation

organized and existing under the laws of the State of Missouri.

2. Defendant Missouri Motor Vehicle Commission (the "Commission") is, and at all times hereinafter mentioned was, a Type III commission within the Missouri Department of Revenue, and which was created by RSMo § 301.553 (1992).

3. Defendants Bill Best, Tom Calder, Jack Chance, Sandra Focht, Bill McMurray, Carl Richardson and Don White, are, and at all times hereinafter mentioned were, members of the Missouri Motor Vehicle Commission, and each are sued in his/her official capacity as a member of the Missouri Motor Vehicle Commission. The named individual defendants, together with Defendant Missouri Motor Vehicle Commission, are hereinafter collectively referred to as the "Commission").

4. The Commission is responsible for the licensing and regulation of all manufacturers, motor vehicle dealers and boat dealers pursuant to RSMo §§ 301.550-301.572.

5. Plaintiff is, and at all times hereinafter mentioned was, duly licensed by the Commission.

6. In or about August, 1994, the Commission filed its Complaint against Plaintiff alleging violations of its advertising rules and regulations.

7. Count I of the Complaint alleged that an advertisement placed by Defendant in *The Kansas City Star* on April 2, 1994, which offered a $5,000 guarantee that Plaintiff will beat any deal constituted a violation of 12 CSR 60-5.010(2)(AA). That regulation provides:

> Licensees shall not make any reference to matching or bettering competitors, prices in any advertisement unless all limitations are clearly and conspicuously disclosed. Any policy shall not place an unreasonable burden on the consumer.

8. Count II of the Complaint alleged that an advertisement placed by Defendant in *The Kansas City Star* on May 28, 1994, which offered "$100 over Ford factory invoice on all models in stock," constituted a violation of 12 C.S.R. 60-5.010(2)(M), which provides:

> Licensee shall not advertise a motor vehicle with regards to the invoice price, dealer cost, or any similar term or phrase as consumers equate invoice with cost which is misleading and prohibited.

9. The Commission purports to have authority to discipline Plaintiff for the foregoing alleged violations pursuant to RSMo § 301.562.2(6), which provides that the Commission may discipline licensees for:

> (6) Violation of, or assisting or enabling any person to violate any provisions of sections 301.550 to 301.572 or of any lawful rule or regulation adopted pursuant to sections 301.550 to 301.572.

10. On October 28, 1994, a hearing on this matter was held before William B. Gillespie (the "Hearing Officer") at which hearing Plaintiff and the Commission each presented their evidence.

11. On February 1, 1995, Plaintiff filed a Motion to Dismiss the Complaint for the reason that the Commission lacked jurisdiction to enter a decision as more than

90 days had elapsed since the date of hearing, in violation of 12 CSR 605.010.12(BB)(4) and 12 CSR 60-4.040(8).

12. On or about February 13, 1995, Plaintiff's Motion to Dismiss was denied by the Commission for the reason that Plaintiff failed to establish that it was prejudiced by the delay.

13. On or about February 9, 1995, the Hearing Officer issued his Order (hereinafter the "Hearing Officer's Decision"), finding and ordering as follows:

a. that Plaintiff consciously violated 12 CSR 605.010(2)(AA), and ordering that a private letter of admonition be issued to Plaintiff; and

b. that Plaintiff consciously violated 12 CSR 605.010(2)(M), and ordering that Plaintiff's license to operate as a Motor Vehicle Dealer within the State of Missouri be suspended for two days.

14. On February 23, 1995, Plaintiff filed its Application for Review of the Hearing Officer's Decision, for the reasons that:

a. the Commission was without jurisdiction to enter a decision in this matter by failing to render its decision within 90 days as required by the Commission's rules and regulations;

b. the advertising regulations at issue violated the Due Process Clause, Equal Protection Clause and First Amendment of the Constitutions of the State of Missouri and the United States, as well as the Art. I, § 31 of the Missouri Constitution which prohibits any administrative agency from making any rules which impose a fine or imprisonment.

c. The Hearing Officer's decision was unsupported by substantial evidence;

d. The Hearing Officer's decision was arbitrary and capricious;

e. The Hearing Officer's decision was insufficient under the law; and

f. The Hearing Officer was without jurisdiction to render an Order because the Commission failed to present proof that the disciplinary action was pursued as a result of the approval of a majority of the Commissioners.

15. Plaintiff's Application for Review was considered by the Commission and, on May 23, 1995, the Commission entered its Opinion that the facts did not support the Hearing Officer's decision to impose a two-day suspension. The Commission therefore set aside the Hearing Officer's decision of February 9, 1995, and instead ordered that Plaintiff be issued a private reprimand for its violations of both 12 CSR 60-5.01(2)(AA) and 12 CSR 60-5.020(2)(M).

16. Plaintiff has fully exhausted its administrative remedies.

17. Plaintiff seeks judicial review of the final decision of the Commission for the following reasons:

a. The Hearing Officer was without jurisdiction to enter a decision in this matter by failing to render its decision within 90 days of the hearing as required by the 12 CSR 60-5.010.2(BB)(4) and 12 CSR 60-4.040(8);

b. The advertising regulations promulgated by the Commission, on its face and as applied to Plaintiff, violate Plaintiff's right to equality under the law, as guaranteed by the Missouri Constitution, Art. I, § 2; and the United States Constitution, Amendment XIV, § 1, in that the regulations proscribe certain advertising conduct of Missouri motor vehicle dealers but do not proscribe the identical advertising conduct of out-of-state motor vehicle dealers that place advertisements within the State of Missouri.

c. The advertising regulations promulgated by the Commission, on its face and as applied to Plaintiff, violate Plaintiff's right to free speech, as guaranteed by the Missouri Constitution, Art. I, § 8; and the United States Constitution, Amendment I.

d. The advertising regulations promulgated by the Commission, on its face and as applied to Plaintiff, violate Plaintiff's right to life, liberty and the pursuit of happiness without due process of law, as guaranteed by the Missouri Constitution, Art. I, §§ 2, 10; and the United States Constitution, Amendment XIV, § 1.

e. The advertising regulations promulgated by the Commission, on its face, violate Missouri Constitution, Art. I, § 31, which prohibits any commission or other administrative agency from making any rule fixing a fine or imprisonment as punishment for its violation.

f. The Hearing Officer's decision was unsupported by substantial evidence;

g. The Hearing Officer's decision was arbitrary, capricious and unreasonable in relationship to the facts presented and the law;

h. The Hearing Officer's decision was insufficient under the law, and therefore the Commission was without jurisdiction to proceed with any Orders arising therefrom; and

i. The Hearing Officer was without jurisdiction to render an Order because the Commission failed to present proof that the disciplinary action was pursued as a result of the approval of a majority of the Commissioners;

j. The Hearing Officer's decision involves an abuse of discretion.

18. This Court has the authority under RSMo § 536.120 to stay the enforcement of the Commission's Order and such stay may be conditioned upon such terms as shall appear proper to the court as long as the court is satisfied that the public interest will not be prejudiced thereby.

WHEREFORE Plaintiff Adams Ford Belton, Inc. prays this Court to reverse the final decision of the Commission; to stay the Commission's Order pending this Court's finding on review; and such other and further relief as the Court deems just and equitable.

ENSZ & JESTER, P.C.

By /s/ Robert O. Jester
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SHARON KENNEDY - #40431
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1100 Main Street
Kansas City, Missouri 64105
(816) 474-8010
(816) 471-7910 (FAX)

COOK, VETTER, DOERHOFF & LANDWEHR

By /s/ John D. Landwehr
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Jefferson City, Missouri 65101
(314) 635-7977
(314) 635-7414 (FAX)

Attorneys for Plaintiff

APPENDIX J

BEFORE THE MISSOURI MOTOR VEHICLE COMMISSION

In Re:	)	
	)	
ADAMS FORD BELTON, INC.,	)	Case No. N-1016
License No. D-0047.	)	

RESPONSE

COMES NOW the respondent, Adams Ford Belton, Inc., and hereby enters its response to the Complaint of Petitioner, Missouri Motor Vehicle Commission:

1. The Petitioner's Complaint fails to state a lawful charge against this Respondent and therefore should be dismissed.

2. Respondent admits paragraphs 1, 2, 3, 4 and 5 of the Complaint.

3. In response to paragraph number 6, the Respondent states that the Exhibit "A" speaks for itself and Respondent denies each and every allegation in consistent [sic] therewith.

4. Respondent denies paragraphs 7 and 8 of Count I of the Complaint and will require strict proof thereof.

5. In response to paragraph 9 of the Complaint, the Respondent incorporates its answers to paragraphs 1 – 3 of the Complaint.

6. Respondent admits paragraph 10 of the Complaint and states that Exhibit B speaks for itself and

denies each and every allegation contrary thereto in paragraph 11 of said Complaint.

7. The Respondent denies paragraphs 12 and 13 of said Complaint.

8. The Respondent affirmatively pleads that the advertising regulations referenced in paragraphs 7 and 12 of the Petitioner's Complaint were not lawfully enacted by the Missouri Motor Vehicle Commission and are unconstitutional both under the Missouri Constitution of 1945 as well as under the Constitution of the United States of America in that said regulations violate the following constitutional provisions:

(a) Missouri Constitution of 1945, Article 1, Section 2:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, their pursuit of happiness, and the enjoyment of the gains of their industry; that all persons are created equal and are entitled to equal rights and opportunities under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

(b) Missouri Constitution of 1945, Article 1, Section 8:

That no law shall be passed impairing the freedom of speech, no matter by what means communicated; that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all

suits and prosecutions for libel or slander, the truth thereof may be given in evidence; and in suits and prosecutions for libel, the jury, under the direction of the court, shall determine the law and the facts.

(c) Missouri Constitution of 1945, Article 1, Section 10:

That no person shall be deprived of life, liberty or property without due process of law.

(d) Missouri Constitution of 1945, Article 1, Section 31:

That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation.

(e) The Constitution of the United States of America, Article 1, Section 8:

Congress shall have power to lay and collect taxes, duties, impost and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States; . . . To regulate commerce for foreign nations, and among the several states, and with the Indian tribes;

(f) The Constitution of the United States of America, Amendment No. 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(g) The Constitution of the United States of America, Amendment No. 14, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9. The Petitioner affirmatively pleads that the regulations regarding advertising practices as enacted by the Missouri Motor Vehicle Commission are unreasonable, vague, unconstitutional, and in restraint of trade, and reflect a clear intent to deny Missouri Motor Vehicle dealers, and specifically the Respondent, equal protection under the law.

10. In addition, the Respondent affirmatively pleads that the Respondent's advertisement attached to the Complaint as Exhibit B is not an advertisement with reference to "a" motor vehicle as required in the regulation and further states that said advertisement does clearly disclose that it specifically refers to the Ford Motor Company factory invoice which does reflect the price of the vehicle to the dealer and therefore the consumer is justified in equating the reference to the Ford Factory Invoice to cost and as a result there is nothing misleading about said statement contained within said advertisement and it is therefore not in violation of the regulation.

11. In addition, the Respondent affirmatively pleads that the statements contained within the Respondent's advertisement which is Exhibit A to the Complaint are not in violation of the Petitioner's regulations as said statements contained therein are clear and concise and that the Respondent's policy with reference to said advertising theme is reasonable and based on commercially sound judgment that does not place an unreasonable burden on the consumer.

WHEREFORE, the Respondent, Adams Ford Belton, Inc., moves for dismissal of Petitioner's Complaint, for an award of its cost, attorneys fees and for such other relief as this commission may deem necessary and proper.

ENSZ & JESTER, P.C.

/s/ Robert O. Jester
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1100 Main Street
Kansas City, Missouri 64105
1-816-474-8010
1-816-471-7910 (FAX)

ATTORNEYS FOR ADAMS FORD BELTON, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Response was Fax'd this 27th day of October, 1994, to: Mr. John T. Banjak, Assistant Attorney General, Seventh Floor, Broadway State Office Building, 211 West High Street, P. 0. Box 899, Jefferson City, Missouri 65102, Attorney for Petitioner; and a copy to Mr. John S. Riley, Executive Director of Missouri Motor Vehicle Commission, 623 East Capitol, Jefferson City, Missouri 65102.

/s/ Robert O. Jester
Attorney for Adams Ford Belton, Inc.

APPENDIX K

IN THE CIRCUIT COURT
OF COLE COUNTY, MISSOURI

ADAMS FORD BELTON, INC., a Missouri corporation, 800 Quik Trip Way Belton, MO 64012, Plaintiff, v. MISSOURI MOTOR VEHICLE COMMISSION, Serve: JOHN S. RILEY EXECUTIVE DIRECTOR, 623 East Capitol Jefferson City, MO 65102, Defendant.	)	Case No. CV 194-1312 CC

PETITION FOR DECLARATORY JUDGMENT AND REQUEST FOR STAY OF AGENCY PROCEEDING

(Filed Oct. 21, 1994)

COMES NOW Plaintiff Adams Ford Belton, Inc., hereinafter referred to as Adams Ford, and petitions this Court for a Declaratory Judgment pursuant to Section 536.050.1 V.A.M.R. and Missouri Civil Procedure Rule 87.02(c) with regard to certain administrative regulations and further petitions this Court to enjoin an action pending before the Missouri Motor Vehicle Commission until this Court renders its Declaratory Judgment.

1. Plaintiff Adams Ford is a motor vehicle dealership licensed by the Missouri Motor Vehicle Commission and operating at its place of business at 800 Quik Trip Way in Belton, Cass County, Missouri 64012.

2. Defendant Missouri Motor Vehicle Commission is a Missouri commission/agency created by §301.553 RSMo. 1992 and is responsible for the licensing and regulation of all manufacturers, motor vehicle dealers and boat dealers pursuant to §§301.550 to 301.572 RSMo.

3. On or about August 17, 1994, the office of the Missouri Attorney General acting upon instructions from Defendant Missouri Motor Vehicle Commission filed Complaint number N-1016 against Plaintiff Adams Ford, a copy of said complaint which is attached to this Petition and marked Exhibit "1" and incorporated herein by reference.

4. The Complaint, designated Exhibit "1" to this Petition, seeks to discipline Plaintiff Adams Ford for the placement of two advertisements on different occasions in the *Kansas City Star.* Said advertisements are attached to the Complaint as Exhibits A and B.

5. Section 536.050.1 V.A.M.R. and Missouri Civil Rule 87.02(c) both provide in part that this Court has the power to render a Declaratory Judgment with respect to the validity of agency rules and the threatened application thereof. The Missouri Motor Vehicle Commission, Defendant, seeks to apply certain regulations issued by it with reference to the Advertising Practices For Motor Vehicle Dealers, and the application of same presents a clear and present threat and potential adverse consequences for Plaintiff Adams Ford.

6. Defendant Missouri Motor Vehicle Commission alleges that the Plaintiff has violated 12 C.S.R. 60-5.010(2)(aa), which provides as follows:

> Licensees shall not make any reference to matching or bettering competitors' prices in any advertisement unless all limitations are clearly and conspicuously disclosed. Any policy shall not place an unreasonable burden on the consumer;

And, in addition, alleges a violation of 12 C.S.R. 60-5.010(2)(m) which provides as follows:

> Licensees shall not advertise a motor vehicle with regard to the invoice price, dealer costs, or any similar terms or phrase as consumers equate invoice with cost which is misleading and prohibited;

7. The advertising regulations referenced in the foregoing paragraph and enacted by the Missouri Motor Vehicle Commission are unconstitutional, both under the Missouri Constitution of 1945 as well as under the constitution of the United States of America in that said regulations violate the following constitutional provisions:

> (a) Missouri Constitution of 1945, Article 1, Section 2:
>
> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, their pursuit of happiness, and the enjoyment of the gains of their industry; that all persons are created equal and are entitled to equal rights and opportunities under the law;

that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

(b) Missouri Constitution of 1945, Article 1, Section 8:

That no law shall be passed impairing the freedom of speech, no matter by what means communicated; that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander, the truth thereof may be given in evidence; and in suits and prosecutions for libel, the jury, under the direction of the court, shall determine the law and the facts.

(c) Missouri Constitution of 1945, Article 1, Section 10:

That no person shall be deprived of life, liberty or property without due process of law.

(d) Missouri Constitution of 1945, Article 1, Section 31:

That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation.

(e) The Constitution of the United States of America, Article 1, Section 8:

Congress shall have power to lay and collect taxes, duties, impost and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all

duties, imposts and excises shall be uniform throughout the United States; . . . To regulate commerce for foreign nations, and among the several states, and with the Indian tribes;

(f) The Constitution of the United States of America, Amendment No. 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(g) The Constitution of the United States of America, Amendment No. 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8. The regulations regarding advertising practices for Missouri motor vehicle dealers as enacted by the Missouri Motor Vehicle Commission, Defendant herein, are unreasonable, unconstitutional, in restraint of trade, and reflect a clear intent to deny Missouri motor vehicle dealers, and specifically the Plaintiff, equal protection under the law.

9. The above-described regulations of the Missouri Motor Vehicle Commission are unlawful and improper in

that the regulations are not authorized by Sections 301-550 to 301-572 V.A.M.R. and are in excess of the authority of the Commission as set forth therein.

10. The hearing in Case No. N-1016 is presently set for October 28, 1994. Economy of justice requires that Plaintiff be allowed to seek this judicial determination of the purely legal issues contained in this Petition, namely, the constitutionality and lawfulness of the regulations described above, without having first to litigate the underlying facts before the Commission itself.

11. Plaintiff Adams Ford petitions this Court to enter its Declaratory Judgment with reference to the advertising practices regulations of Defendant Missouri Motor Vehicle Commission set out in Paragraph 6 of this Petition and declare same unconstitutional, void and unenforceable under both the Missouri Constitution as well as the Constitution of the United States of America, and to enjoin said Defendant Missouri Motor Vehicle Commission from further enforcing same, and to require the immediate dismissal of the Commission's Complaint against this Plaintiff, and to provide Plaintiff Adams Ford with such other relief as this Court may find appropriate under the circumstances.

WHEREFORE, Plaintiff Adams Ford Belton, Inc. prays this Court to enter its Order and Judgment declaring the rights of the Plaintiff with reference to 12 C.S.R. 60-5.010, *et seq.* Advertising Practices For Motor Vehicle Dealers as enacted by Defendant Missouri Motor Vehicle Commission and to declare 12 C.S.R. 60-5.010(2)(aa) and 12 C.S.R. 60-5.010(2)(m) as unconstitutional, void and unenforceable, and to terminate the action of the Motor

Vehicle Commission set out in Complaint number N-1016 against Plaintiff Adams Ford Belton, Inc., and for such other relief as this Court may deem just and proper.

ENSZ & JESTER, P.C.

/s/ Robert O. Jester
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COOK, VETTER, DOERHOFF
& LANDWEHR

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ATTORNEYS FOR
PLAINTIFF

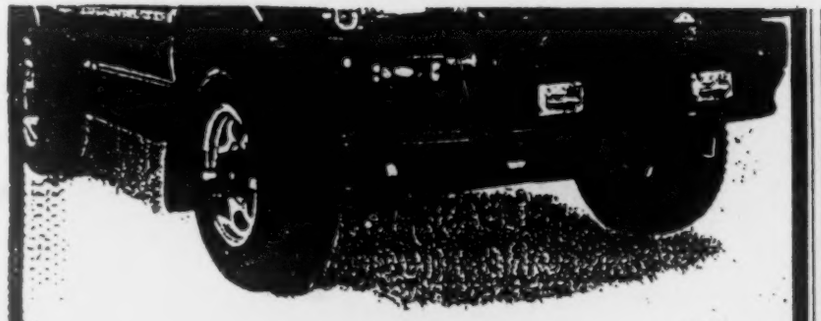
[EXHIBITS OMITTED]

APPENDIX L

NOTE

BEST AVAILABLE COPY

NOTE



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